No. 10056

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,

Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

LAWLER, FELIX & HALL,
OSCAR LAWLER,
MAX FELIX,
WILLIAM T. COFFIN,
800 Standard Oil Building, Los Angeles,
Attorneys for Defendant and Appellee, George J. Meyer Manufacturing Company.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

PAGE

III.

TABLE OF AUTHORITIES CITED.

PAGE

STATUTES.

TEXTBOOKS. PAGE

No. 10056

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,

Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement as to Jurisdiction.

The Court below, the District Court of the United States for the Southern District of California, Central Division (hereinafter called the "District Court") acquired jurisdiction pursuant to the provisions of Sections 24 and 28 of the Judicial Code (28 U. S. C. A. §§41 and 71] by virtue of the removal of the cause to it from the Superior Court of the State of California in and for the County of Los Angeles (hereinafter called the "Superior Court") on the ground of diversity of citizenship. Appellant is a corporation incorporated under the laws of the State of California and a citizen and resident of that State. [Original Complaint—Tr. p. 2; Petition for Removal—Tr. pp. 10-11; Amended Complaint—Tr. p. 24.]

Appellee is a corporation incorporated under the laws of the State of Wisconsin and a resident and citizen of that State. [Original Complaint—Tr. pp. 2-3; Petition for Removal—Tr. p. 11; Amended Complaint—Tr. pp. 24-25.] The action is one of a civil nature at law for damages for alleged breach of warranty and the amount in controversy, exclusive of interest and costs, exceeds $3,000.00. [Original Complaint—Tr. p. 7; Petition for Removal—Tr. pp. 11-12; Amended Complaint—Tr. pp. 25, 42.]

This Court has appellate jurisdiction under Section 128 of the Judicial Code (28 U. S. C. A. §225) if the appeal was taken in time. As will hereafter appear, however, it is appellee's contention that the appeal was not taken within the time prescribed by law and hence that this Court does not have jurisdiction.

Statement of the Case.

Appellant instituted this action against appellee by filing in the Superior Court, on May 16, 1940, its verified "Complaint—Damages for Breach of Warranty". [Tr. pp. 2-9.] In such complaint appellant alleged in substance that on February 14, 1938, appellant as buyer and appellee as seller entered into a written contract for the purchase by appellant from appellee of certain beer bottling machinery for use in appellant's business of brewing and bottling beer [Tr. p. 3]; that in the contract appellee warranted and guaranteed the proper working of the machinery when operated reasonably and in accordance with appellee's instructions [Tr. pp. 4-6]; that following the installation of the machinery various parts thereof broke and became out of adjustment thereby causing

shutdowns in the operation of the machinery, all to appellant's damage in the sum of $50,000.00. [Tr. p. 7.] A copy of the contract between appellant and appellee was annexed to the complaint, marked Exhibit "A" and by reference incorporated therein. [Tr. pp. 3, 8.]

Within the time that appellee was required by the California laws and the rules of the Superior Court to plead to appellant's complaint, and on May 27, 1940, appellee filed in the Superior Court a petition for the removal of the cause to the District Court, together with the necessary bond for removal. [Tr. pp. 10-18.] On the same day the Superior Court made an order for such removal of the cause. [Tr. pp. 18-19.] In due course, and on June 21, 1940, a copy of the record in the Superior Court was filed with the Clerk of the District Court. [Tr. pp. 19-20.]

After the filing of the copy of the record in the District Court, appellee moved that Court to dismiss the action, on the ground that the complaint failed to state a claim against appellee upon which relief could be granted. [Tr. pp. 20-21.] Such motion was granted by the District Court by its order dated July 15, 1940, with leave, however, to appellant to file an amended complaint within twenty days. [Tr. pp. 22-23.]

On November 5, 1940, appellant filed in the District Court an amended complaint [Tr. pp. 24-43] which was also verified. [Tr. p. 43.]

The amended complaint, like the original complaint, was designated one to recover "Damages for Breach of Warranty". [Tr. p. 24.] The amended complaint, however, differed from the original in two important respects. *First:* No copy of the contract of sale between appellant

and appellee was annexed to the amended complaint, nor was it therein fully and fairly pleaded according to its legal effect in that it did not disclose, *inter alia,* that the contract contained any limitation upon appellee's liability for damages for breach of warranty. *Second:* The damages claimed by appellant were increased from $50,000.00 to $214,155.78, and the so augmented damages were alleged to consist of the following items:

(1) $37,978.14 for wages paid and to be paid by appellant to "extra" labor required to operate the machinery. [Tr. pp. 31-33.]

(2) $13,363.62 for beer spoiled because the machinery did not properly pasteurize it. [Tr. pp. 33-35.]

(3) $50,192.00 for profits and good will lost because beer, improperly pasteurized by the machinery, reached the hands of appellant's customers. [Tr. pp. 35-36.]

(4) $19,380.00 as the cost of "extra" caustic soda required and to be required by appellant in the operation of the machinery. [Tr. pp. 36-37.]

(5) $1,262.63 for beer lost because the filling apparatus of the machinery filled beer bottles too full. [Tr. pp. 37-38.]

(6) $27,920.00 for "excessive depreciation" in the machinery [Tr. p. 38]; $2,729.98 for expense of replacing broken parts [Tr. pp. 38-39]; and $2,531.25 for cost of labor engaged to repair the machinery. [Tr. p. 39.]

(7) $26,458.16 for wages which appellant paid to its employees who were idle during breakdowns

of the machinery occurring prior to the filing of the amended complaint, and $32,340.00 for wages which appellant will be required to pay to its employees who will be idle during breakdowns anticipated by appellant to occur subsequent to the filing of the amended complaint. [Tr. pp. 39-40.]

While the amended complaint is in two counts, both charge the machinery did not work as warranted, and by each count appellant seeks recovery of the identical items of damage. As we read the first count, it proceeds on the theory of breach of the several oral warranties (termed "representations") alleged in paragraph III thereof [Tr. pp. 25-28]; appellant insists that the theory of the first count is breach of an implied warranty. [Br. pp. 5, 33.] The second count, as appellant states [Br. p. 7], proceeds on the theory of breach of the express warranty or guaranty contained in the written contract.

Responsive to the amended complaint, appellee filed an answer which is set out at length in the record. [Tr. pp. 44-81.] By its answer appellee, *inter alia:*

> (a) Denied the existence of any contract with appellant, other than the written contract for sale of machinery, copy of which is annexed to the original complaint as Exhibit "A" [Tr. p. 8] (and further copy of which is annexed to the answer as Exhibit "A"—Tr. p. 66), as such contract was supplemented by the agreement between the parties dated December 6, 1938, which enlarged the time for payment of the purchase price (copy of the supplemental agreement is annexed to the answer marked Exhibit "B"—Tr. p. 67). [Tr. pp. 46-47, 62-63.]

(b) Denied that appellee made any of the representations detailed in the amended complaint [Tr. p. 46], or made any warranty respecting the machinery sold to appellant except that expressed in the guarantee set forth in the written contract. [Tr. pp. 47-48, 64.]

(c) Denied any breach of warranty [Tr. pp. 48, 64] and alleged that any failure of the machinery to work properly was due exclusively to appellant's failure to operate the same reasonably in accordance with appellee's directions. [Tr. pp. 59-61, 64-65.]

(d) Alleged that the written contract expressly provided that appellee should not be liable for any of the damages claimed by appellant. [Tr. pp. 61-62, 65.]

(e) Set up a counterclaim, based upon an account between appellee and appellant. [Tr. p. 66.]

For the purposes of this appeal it is unnecessary to give detailed consideration to the contents of the answer.

Following the interposition of its answer, appellee filed in the District Court a motion for summary judgment in its favor as to each and every claim asserted against it in and by appellant's amended complaint, on the following grounds:

1. That the pleadings on file, including appellant's original complaint, showed that there was no genuine issue as to the following material facts:

(a) The agreement between appellant and appellee was reduced to writing and completely expressed in the written contract dated February 14, 1938, as such contract was supplemented by the agreement dated December 6, 1938.

(b) In both the original and supplemental contracts it is expressly provided that no verbal understanding is binding unless specified therein.

(c) It is further expressly provided in both the original and supplemental contracts that appellee shall not be liable for any damages or consequential damages incident to the operation of the machinery.

(d) The damages claimed to have been sustained by appellant, and itemized in appellant's amended complaint, are damages or consequential damages incident to the operation of the machinery.

2. That by virtue of the facts aforesaid, appellee is entitled as a matter of law to a judgment in its favor as to each and every claim asserted by appellant in its amended complaint.

[Tr. pp. 81-83.]

The motion for summary judgment came on regularly for hearing before the District Court on September 29, 1941, and was thereupon argued by counsel for the respective parties. [Tr. p. 88.] At the hearing and pursuant to stipulation of counsel, photographic copies of the contract between the parties dated February 14, 1938, and the contract supplemental thereto dated December 6, 1938, were received in evidence. [Tr. pp. ii, 88.] Following the hearing and argument on September 29, 1941, the District Court took the matter under submission and thereafter, and on October 8, 1941, made its order granting the motion. [Tr. p. 84.]

The Clerk of the District Court entered the order granting the appellee's motion for summary judgment and notified counsel on October 8, 1941. [Tr. p. 87.] On the same day the District Court filed a memorandum decision. [Tr. pp. 85-86.]

A formal judgment on appellant's claims was signed by the District Judge on October 11, 1941, and entered in the Civil Docket on October 13, 1941. [Tr. pp. 87-89.]

Appellant filed notice of appeal on January 13, 1942. [Tr. pp. 89-90.] In support of its appeal appellant urges that the District Court erroneously granted appellee's motion for summary judgment, and there is thus presented to this Court the same question which was presented to the District Court, viz.: Do the provisions of the written contract between the appellant and appellee preclude recovery from appellee of the damages claimed by appellant in its amended complaint?

SUMMARY OF ARGUMENT.

I.

This Court has no jurisdiction, because notice of appeal was not filed until more than three months had elapsed after the entry of the order granting appellee's motion for summary judgment.

II.

The agreement between the parties was reduced to writing and the express terms of the written contract preclude recovery from appellee of the damages claimed by appellant in its amended complaint.

A. The contract between the parties is in writing, and there is not, and cannot be, any genuine issue as to its provisions.

B. Parties to a contract may specify the remedy or remedies which will be available to each on the default of the other and, likewise, by agreement, may limit the liability of the defaulting party.

C. Appellant's exclusive remedy for the alleged breach of warranty was that specified in the contract, namely, the right to return and receive credit for defective parts.

D. The damages claimed by appellant are *consequential damages* incident to the operation of the machinery, and the written contract between the parties provides that appellee shall not be liable for such damages.

III.

Reply to appellant's points.

A. The rule of *ejusdem generis* is not applicable to the clause of the contract in question.

B. The term "consequential damages," as used generally in sales agreements and in the instant contract, means exactly the type of damages appellant seeks to recover.

C. The allegations of the amended complaint do not show any practical construction of the contract by the parties, and the clause of the contract in question, in any event, is free from ambiguity.

D. No question as to the statute of limitations or laches was presented by the motion for summary judgment, nor decided by the District Court, nor is any such question presented by this appeal.

E. It is immaterial whether any warranty, in addition to that expressed in the written contract, could be implied; the sole question is as to appellee's liability for the damages claimed by appellant in its amended complaint.

F. There is no inconsistency between the guarantee, as expressed in the contract, and the clause therein contained exonerating appellee from liability for damages incident to the operation of the machinery.

ARGUMENT.

I.

This Court Has No Jurisdiction Because Notice of Appeal Was Not Filed Until More Than Three Months Had Elapsed After the Entry of the Order Granting Appellee's Motion for Summary Judgment.

A period of three months and five days elapsed between the entry on October 8, 1941 [Tr. p. 87] of the order of the District Court granting appellee's motion for summary judgment and the filing by appellant on January 13, 1942, of its notice of appeal. [Tr. pp. 89-90.]

This Court has jurisdiction to review a *final decision* of the District Court, provided that the appeal be taken within three months after the entry of such final decision.

> *Judicial Code,* Sec. 128 (28 U. S. C. A. §§225, 230).

We think it clear that the order of the District Court granting appellee's motion for summary judgment was a final decision within the meaning of Section 128 of the Judicial Code. The familiar test to be applied to determine whether or not an order is a final decision is this: Does the order terminate the litigation, so that, if affirmed, the Court below will have nothing to do except to execute the order if it grants affirmative relief?

> *State of Washington v. United States* (C. C. A. 9), 87 Fed. (2d) 421, 433.

Thus it has been uniformly held that an order of dismissal or an order granting a motion to dismiss is a final

decision, from which an appeal will lie because it terminates the litigation.

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 96, 42 Sup. Ct. 35, 66 L. Ed. 144;

Hicks v. Bekins Moving & Storage Co. (C. C. A. 9), 115 Fed. (2d) 406, 409;

Johnson v. Horton (C. C. A. 9), 63 Fed. (2d) 950, 952;

Colorado Eastern Ry. Co. v. Union Pacific Ry. Co. (C. C. A. 8), 94 Fed. 312, 313;

Collins v. Metro-Goldwyn Pictures Corporation (C. C. A. 2), 106 Fed. (2d) 83, 84-86.

The order made by the District Court granting appellee's motion for summary judgment, following the recital therein of the nature of the motion and the submission of the matter for decision, declared:

> "The said motion *is hereby granted* upon the ground that by the terms of the contract of sale of the machinery, dated February 14, 1938, the plaintiff waived the damages it now seeks to recover." [Tr. p. 84.]

(Emphasis here and elsewhere is ours, unless otherwise indicated.)

The phraseology of such order is strikingly similar to that of the order considered in *Johnson v. Wilson* (C. C. A. 9), 118 Fed. (2d) 557. This Court held that the order made in that case was a final decision from which an appeal would lie; the material portion of that order read:

> "It is ordered that judgment be, and the same hereby is, granted in favor of defendant upon the

ground that the evidence is insufficient to establish that defendant had reasonable cause to believe that a preference would thereby be effected by the payments in question to him made and by the action sought to be recovered."

118 Fed. (2d) 558.

The order in the instant case provided that the motion for summary judgment *"is hereby granted,"* which is equivalent to "judgment in appellee's favor is hereby granted." To paraphrase the language of the United States Supreme Court in *Wilson v. Republic Iron & Steel Co., supra,* the order granting appellee's motion for summary judgment "effectively terminates plaintiff's (appellant's) case, prevents the plaintiff from further prosecuting the same and relieves the defendant from putting in a defense." (257 U. S. 96.) It is therefore submitted that appellant's notice of appeal not having been filed until more than three months after the entry of the order, the appeal was not timely taken and, hence, that this Court is without jurisdiction.

Walters v. Baltimore & O. R. Co. (C. C. A. 3), 76 Fed. (2d) 599, 600.

II.

The Agreement Between the Parties Was Reduced to Writing and the Express Terms of the Written Contract Preclude Recovery From Appellee of the Damages Claimed by Appellant in Its Amended Complaint.

A. The Contract Between the Parties Is in Writing, and There Is Not, and Cannot Be, Any Genuine Issue as to Its Provisions.

In its amended complaint appellant did not plead the contract between the parties *in haec verba,* nor did appellant in its amended complaint indicate or suggest that such contract contained any limitation upon the liability of appellee for damages for breach of warranty. A copy of the written contract between the parties, however, was annexed to appellant's original complaint as Exhibit "A" thereof, and in that complaint, which was verified [Tr. p. 9], appellant alleged that the contract between it and appellee was in writing and

> "that a full, true and correct copy of said contract is attached hereto, marked Exhibit 'A,' incorporated herein and made a part hereof, the same as though said contract was set forth fully and at length in this paragraph." [Tr. p. 3.]

Appellant further averred in its original complaint that on or about December 6, 1938, the contract between it and appellee was changed and modified "in reference only to the time and manner of payments agreed to be made by" appellant to appellee "on account of the purchase price of said machinery" and that at that time, except as to the method of payment, the original contract was "reaffirmed and all of the terms and conditions thereof again agreed upon by said parties." [Tr. p. 5.] In view of such alle-

gations under oath, there is not, and cannot be, any dispute as to what were the provisions of the agreement between the parties and, pursuant to stipulation between counsel for appellant and appellee, copies of both the original contract and the supplement thereto were received in evidence at the time of the hearing of the motion for summary judgment in the District Court. [Tr. p. 88.]

The original contract, as well as the supplement thereto, expressly repudiates all verbal understandings not incorporated therein. [Tr. p. 8.] There is, hence, no occasion to do more than examine the written contract in order to determine the agreement of the parties, and parol evidence would not be admissible to vary its terms.

Estate of Gaines, 15 Cal. (2d) 255, 264-265, 100 Pac. (2d) 1055;

Merchants Finance Co. v. Acosta Bros., 82 Cal. App. 431, 433, 255 Pac. 772;

Jones v. Keefe, 159 Wis. 584, 150 N. W. 954, 955;

Ohio Electric Co. v. Wisconsin-Minnesota Light & Power Co., 161 Wis. 632, 155 N. W. 112, 113;

Knight & Bostwick v. Moore, 203 Wis. 540, 234 N. W. 902, 904.

Since appellant insists that the contract must be interpreted in accordance with the laws of Wisconsin (Br. pp. 16-18), the decision in *Jones v. Keefe, supra,* is peculiarly significant. That case was an action to recover the purchase price of an automobile sold by the plaintiffs to the defendant; the agreement of sale was reduced to writing. In such written contract the sellers guaranteed the car for one year and stipulated that there were no verbal understandings unless specified in the agreement. The buyer defended on the ground of breach of warranty, contending that the car did not fulfill the representations

made by plaintiffs respecting its age, condition and fitness for use as an automobile. The trial court refused to receive evidence of such oral representations and entered judgment in favor of the sellers. The Supreme Court of Wisconsin affirmed the judgment and, in the course of its opinion, said:

> "The terms of sale were finally reduced to writing, and this excludes evidence of oral negotiations preceding it, if the terms are free from ambiguity. The contract terms are plain and definite in meaning when applied to the subject of the transaction and cannot be varied or modified by oral testimony. Johnson v. Pugh, 110 Wis. 167, 85 N. W. 641; Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487. *The clause of the contract that no verbal agreements were entered into not expressed in writing is expressive of the intent and purpose of the parties that all the terms and conditions of the sale are embraced in it.* This stipulation supports the position that the negotiations were finally embodied in the written agreement."
>
> 150 N. W. 955.

The following quotation from *Merchants Finance Co. v. Acosta Bros., supra,* is also in point and shows that the California law is to the same effect:

> "And, of course, in so far as an express oral warranty that the tractor was fit for the purpose of pulling a six-foot double disc is concerned, such testimony would be inadmissible on the ground that the contract was thereafter reduced to writing, and all oral negotiations were merged in the written contract."
>
> 82 Cal. App. 433.

Accordingly, there was not below, and there cannot be here, any genuine issue as to the terms of the agreement between the parties.

B. Parties to a Contract May Specify the Remedy or Remedies Which Will Be Available to Each on the Default of the Other and, Likewise, by Agreement, May Limit the Liability of the Defaulting Party.

The law does not compel parties to enter into a contract, and therefore permits them to make such bargain as they see fit respecting the remedy available to, or the damages recoverable by, either party upon the default of the other.

> "When a man commits a tort, he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of law a liability to damages, unless a certain promised event comes to pass. But, unlike the case of torts, as the contract is by mutual consent, *the parties themselves,* expressly or by implication, *fix the rule by which the damages* are to be measured."
>
> *Globe Refining Co. v. Landa Cotton Oil Co.,* 190 U. S. 540, 543, 47 L. Ed. 1171, 23 Sup. Ct. 754.

The Circuit Court of Appeals for the Third Circuit had occasion to apply this principle in *Sharples Separator Co. v. Domestic Electric Refrigerator Corp.,* 61 Fed. (2d) 499. In that case a buyer sued to rescind a contract for the sale of refrigerators on the ground that the refrigerators were not as warranted. The contract provided that the seller would replace parts which did not meet the express warranty contained in the contract, namely, that the refrigerators and parts would be of first-class workmanship and material. The Court held that the exclusive remedy for the breach of such warranty was to return the defective parts and, accordingly, denied the buyer the right to rescind, saying:

> "As a general principle, the parties to a contract to sell personal property may provide whatever terms

> they choose. They may *exclude all ordinary rights* or provide that the rights of the buyer for a breach of warranty *shall be limited to a certain remedy,* and, when they provide for an exclusive remedy, the buyer must avail himself of it or go without redress."
>
> 61 Fed. (2d) 501.

In *Barnard & Leas Manufacturing Co. v. Smith, 77* Ark. 590, 92 S. W. 858, a buyer of mill machinery, when sued for the purchase price, counterclaimed for damages to its business alleged to have resulted from failure of the machinery to operate as warranted. The Court held that the buyer was not entitled to recover such damages, because of the following provision contained in the contract of sale:

> "First party shall not be liable for any pecuniary damages either for delays in shipment or in starting said mill, demonstrating results, or for defective material, other than to make good within a reasonable time said defects."
>
> 92 S. W. 861.

Lee v. Pauly Motor Truck Co., 179 Wis. 139, 190 N. W. 819, was an action by the buyer of a truck to recover damages alleged to have been sustained as a result of breach of warranty to the effect that the truck was free from defects. The contract provided that the seller would make good at its factory any part or parts found to be defective and returned to the seller within ninety days and that this was the limit of seller's liability. The trial court permitted the buyer to recover damages. The Wisconsin Supreme Court reversed, holding the sole remedy under the contract was to return defective parts to the seller and demand replacement.

In *Washington & O. D. Ry. v. Westinghouse Electric & Manufacturing Co.,* 120 Va. 620, 89 S. E. 131, 91 S. E. 646, the seller of equipment for the electrification of a railroad sued for the purchase price. The defendant railroad company counterclaimed for damages because of the seller's failure to make timely delivery, claiming that such failure subjected the railroad company to substantial liability under its lease of the railroad line. The Court held that the damages claimed by the railroad company because by the delay in delivery subjected it to liability under its lease were *consequential* and that the seller was not liable therefor under the clause of the written contract reading:

> "Seller shall not be held responsible or liable for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any other cause which is unavoidable or beyond its reasonable control, or, in any event, for *consequential damages.*"

89 S. E. 133.

In *Morris & Co. v. Power Manufacturing Co.* (C. C. A. 6), 17 Fed. (2d) 689, the buyer of an engine sued the seller for *consequential damages* sustained in its business as a result of the failure of the engine to properly function. The contract of sale provided the engine was guaranteed to have a certain capacity, and if after its installation there should be any question as to the engine's capacity, the seller would either repair or replace the engine, or if unable to make the engine meet the condition, would take it back and refund such part of the purchase price as might have been paid. Such contract superseded a prior agreement which expressly provided the seller should not be liable for "consequential damages."

The Court denied recovery of the alleged damages, holding the sole remedy of the buyer was that stipulated in the contract, viz.: to demand that seller furnish a satisfactory engine or refund the purchase price.

In a number of other cases the Courts have had occasion to consider written contracts of sale containing provisions which specify the remedy of the buyer for breach of warranty or limit the damages he may recover; without exception such contractual provisions have been given effect.

Crandall Engineering Co. v. Winslow Marine Railway Co., 188 Wash. 1, 61 Pac. (2d) 136, 106 A. L. R. 1457;

Graves Ice Cream Co. v. Rudolph W. Wurlitzer Co., 267 Ky. 1, 100 S. W. (2d) 819;

Hill & MacMillan Inc. v. Taylor, 304 Penn. 18, 155 Atl. 103;

Massey-Harris Harvester Co. Inc. v. Hammer, 120 Kan. 700, 244 Pac. 1043;

Martin v. Southern Engine & Pump Co. (Tex. Civ. App.), 130 S. W. (2d) 1065;

Moline Plow Co. v. Hooven, 76 Okla. 250, 185 Pac. 102;

Permutit Co. v. Massasoit Manufacturing Co. (C. C. A. 3), 61 Fed. (2d) 529;

Rose-Derry Corporation v. Proctor & Schwartz, 288 Mass. 332, 193 N. E. 50;

Union Investment Co. v. F. M. Landon Co., 32 Cal. App. 305, 162 Pac. 903;

Wallich Ice Machine Co. v. Hanewald, 275 Mich. 607, 267 N. W. 748.

The written contract between appellant and appellee contains provisions similar to those contained in the sales agreements considered in the cases above cited. Thus, in the instant contract we find:

1. An express guaranty or warranty, viz.: that the machinery would work properly if operated reasonably and in accordance with appellee's instructions;

2. A specification of the remedy available to appellant in the event of the breach of the warranty, namely, the right to return to appellee any defective part or parts of the machinery within two years and to receive credit therefor;

3. An express stipulation that appellee "shall not be liable for delays, damages or consequential damages in shipment, erection, or in operation" of the machinery. [Tr. p. 8.]

C. Appellant's Exclusive Remedy for the Alleged Breach of Warranty Was That Specified in the Contract, Namely, the Right to Return and Receive Credit for Defective Parts.

We think the sole remedy available to appellant for the alleged breach of warranty is that specified in the contract, *i. e.,* the right to return to appellee within two years any defective parts of the machinery and to receive credit therefor. This conclusion is abundantly supported, we submit, by *Sharples Separator Co. v. Domestic Electric Refrigerator Corp., supra; Lee v. Pauly Motor Truck Co., supra,* and *Morris & Co. v. Power Manufacturing Co., supra,* brief digests of which cases appear in the preceding subdivision of this brief.

A decision to the same effect is *Union Investment Co. v. F. M. Landon Co., supra.* In that case the purchaser of a stallion was sued for the balance of the purchase price. The contract of sale was in writing and therein the seller warranted the productivity of the stallion; it was further provided that if the stallion was not as warranted, the seller would replace it with another stallion. The buyer defended on the ground that the stallion was not as warranted. The Court held that under the contract the sole remedy of the buyer was to return the stallion and demand a different horse in its place, saying:

> "By the contract the parties fixed their own remedy in case of a breach, and *it is the exclusive remedy.* They had the right to do this, and having bound themselves to the remedy so fixed, their rights must be measured thereby."
>
> 32 Cal. App. 309.

Another case which is precisely in point is *Permutit Co. v. Massasoit Manufacturing Co., supra.* That was an action for damages for breach of warranty of fitness of a water ,filtration system. The contract contained guarantees as to the capacity of the equipment and the clearness of the water processed thereby and provided that the seller should make good any defects due to faulty design, workmanship or material. The principal damages claimed by the buyer were alleged to have been sustained by use of the water processed by the machine in the course of manufacturing cotton goods. The Court held that the provision of the contract whereby the seller agreed to make good any defects in machinery limited seller's liability and that it was not

liable for damages to goods, in the manufacture of which water processed by the machinery was used. In its opinion the Court said:

> "It follows from what has already been said that the trial court erred in admitting evidence of special damages, consisting of *damages to the manufactured cotton* and of *increase in production, manufacturing, and overhead costs and expenses.* The authorities overwhelmingly establish the doctrine that, where the patries have set out in the written contract the warranties agreed upon and have provided for a remedy in case of a breach of warranty, *the remedy thus provided is exclusive. Sloan v. Wolf Co.,* 124 F. 196 (C. C. A. 8); Hickman v. Sawyer, 216 F. 281 (C. C. A. 4), and Morris & Co. v. Power Mfg. Co., 17 F. (2d) 689 (C. C. A. 6), are but a few of the many cases so holding."
>
> 61 Fed. (2d) 530.

D. The Damages Claimed by Appellant Are *Consequential Damages* Incident to the Operation of the Machinery, and the Written Contract Between the Parties Provides That Appellee Shall Not Be Liable for Such Damages.

As above noted, the written contract between the parties not only specifies the remedy which appellant may pursue for any alleged breach of warranty, but also provides that appellee shall not be liable for damages or consequential damages incident to the operation of the machinery. This latter provision of the contract, without regard to the exclusive character of the remedy specified, suffices to sustain the order granting appellee's motion for summ[illegible] judgment because, as will hereafter appear, the dam[illegible] which appellant seeks to recover by its amended com[illegible] are damages or *consequential damages* incident to [illegible] operation of the machinery.

General damages, as distinguished from *special* or *consequential damages,* for breach of warranty as to the quality or fitness of personal property are measured by the excess, if any, of the value the property would have had if as warranted over its value in its defective condition.

Lichtenthaler v. Samson Iron Works, 32 Cal. App. 220, 224, 162 Pac. 441;

Armstrong Rubber Co. v. Griffith (C. C. A. 2), 43 Fed. (2d) 689, 690;

Wells v. Oldsmobile Co., 147 Ore. 687, 35 Pac. (2d) 232, 234;

22 *Cal. Juris.* 1018;

24 *R. C. L.* 253, 254;

55 *C. J.* 872;

2 *Williston on Sales* (2d Ed.) 1537-1538;

Uniform Sales Act, §69, subd. 7.*

By its amended complaint appellant does not seek general damages, and such pleading contains no allegations as to the difference in value between the machinery as delivered, and as warranted, which allegations, of course, are essential to establish the measure of general damages.

Williams v. Lowenthal, 124 Cal. App. 179, 189, 12 Pac. (2d) 75;

Klein Structural Steel Co. v. John J. Pool Co., 26 Ohio App. 420, 160 N. E. 520.

---

*The Uniform Sales Act was adopted in California in 1931 (Stats. 1931, ch. 1070—Civ. Code 1933, §§1721-1800) and was adopted in Wisconsin in 1911 (Laws 1911, ch. 549—Stats. 1939, §§121.01-121.79). Subd. 7 of §69 above referred to reads:

> "In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Moreover, it affirmatively appears from the face of the contract that it was one of *conditional sale,* whereunder appellee, as seller, retained title pending payment of the deferred portion of the purchase price. It is not alleged in either the original or the amended complaint that the purchase price has been fully paid; non-payment of the full purchase price is averred in the answer. [Tr. p. 48.] Under such circumstances appellant, not having acquired title, could not maintain an action to recover general damages for breach of warranty.

Lichtenthaler v. Samson Iron Works, supra, 32 Cal. App. 224;

Sterrett Operating Service, Inc., v. Baker (C. A. Dist. Col.), 70 Fed. (2d) 780, 781;

Baca v. Fleming, 25 N. M. 643, 187 Pac. 277, 279;

English v. Hanford, 75 Hun. 428, 27 N. Y. Supp. 672.

In the absence of a contractual provision limiting or abrogating the seller's liability therefor, a buyer may recover *special* or *consequential damages,* provided the same were within the contemplation of the parties, *e. g.,* loss of profits, time and money expended in repairing machinery, loss of products spoiled by use of machinery, and loss of business or customers. To quote from Professor Williston's work on sales:

"Consequential Damages for Breach of Warranty of Quality.

"One who warrants goods to possess a certain quality is held to an extensive liability for *consequen-*

tial damages for breach of the warranty, perhaps on the ground that such a person should more readily foresee injurious consequences from a breach of his obligation than an ordinary contractor; perhaps because of the close relation between an action for breach of warranty and the law of torts. If *consequential damages* are natural consequences of a breach of warranty, the plaintiff is generally allowed to recover them. If one sells an animal warranting it to be sound, when in fact it is infected with disease, the seller is responsible for *expense incurred for medicine and medical attendance, and for damages resulting from a communication of the disease to the buyer's other animals* in an action on the warranty. Unwholesome food sold to human beings under an expressed or implied warranty, and hay or grain similarly sold for the purpose of being fed to cattle which contains a substance which poisons the buyer's cattle, subjects the seller to responsibility for the consequences. One who sells barrels with a warranty is liable for the buyer's *loss of the contents owing to defects* in the barrels. The buyer of heating apparatus which fails to fulfill a warranty may recover for the *loss caused by having the building without heat.* One who purchases warranted machinery which owing to breach of the warranty cannot be used may recover *for the loss of time and labor* before the machine can be replaced. * * * Delay due to failure to furnish goods as warranted and *money or labor expended* in reasonable efforts making warranted goods conform to the just requirement of the buyer may be recovered for. *Injury caused by using warranted goods in manufacturing other articles is recoverable* unless the buyer was negligent or unreasonable in failing to discover the defects before using the goods."

2 *Williston on Sales* (2d Ed.) 1541-1543.

See, to the same effect:

2 *Sedgwick on Damages* (9th Ed.) 1602;

2 *Sutherland on Damages* (4th Ed.) 2403, 2413 *et seq.;*

55 *C. J.* 868 *et seq.;*

22 *Cal. Juris.* 1024 *et seq.;*

24 *R. C. L.* 256 *et seq.*

A casual reference to the items of damages which appellant seeks to recover by its amended complaint [Tr. pp. 31-40] suffices to demonstrate that all of such damages are of the character classified by Professor Williston as *consequential damages.* It is equally apparent that all of the damages which appellant seeks to recover are damages incident to the operation of the machinery, viz., wages paid for extra labor required to operate the machinery [Tr. pp. 31-33]; beer lost because the machinery did not properly pasteurize it or filled bottles too full [Tr. pp. 33-35, 37-38]; loss of profits and goodwill occasioned because beer, which the machinery imperfectly pasteurized, reached the hands of appellant's customers [Tr. pp. 35-36]; cost of labor and parts for repairing machinery and excessive cost of operation [Tr. pp. 36-39]; and time and wages lost due to defective operation of machinery [Tr. pp. 39-40].

Appellant makes no contention to the contrary, except that appellant insists that the damages it seeks to recover are *special damages* (Br. p. 5) and not *consequential damages* (Br. pp. 13-23).

Whether the damages be characterized as *special* or *consequential* is immaterial, because those terms are generally used as being synonymous.

> "Consequential or special damages are those that flow naturally, but indirectly, from the wrongful act."
>
> *Pearson v. Spartanburg County,* 51 S. C. 480, 29 S. E. 193, 194.

This is particularly true in the law of sales. Thus, as appears from the foregoing quotation from his work on sales, Professor Williston classifies damages such as those appellant seeks to recover as *consequential damages.* Damages of this character are also classified as *consequential* in the article on sales in *California Jurisprudence* (*22 Cal. Juris.,* p. 1024) and in numerous decisions.

> "Direct damages are always recoverable, and *consequential* losses must be compensated *if it can be determined that the parties contracted with them in view.*"
>
> *Cohn v. Bessemer G. E. Co.,* 44 Cal. App. 85, 91, 186 Pac. 200.

> "Special circumstances, however, may warrant the allowance of *consequential damages* which are the natural result of conditions deemed to have been reasonably within the contemplation of the contracting parties."
>
> *Lewin v. Pioneer Hatchery,* 99 Cal. App. 473, 479, 278 Pac. 902.

To the same effect see:

> *Luitweiler etc. Co. v. Ukiah etc. Co.,* 16 Cal. App. 198, 209, 116 Pac. 707 (decision cited by appellant, Br. p. 32);

Jones v. Holland Furnace Co., 188 Wis. 394, 206 N. W. 57, 59;

Martin v. Southern Engine & Pump Co., supra, 130 S. W. (2d) 1067;

Wallich Ice Machine Co. v. Hanewald, supra, 267 N. W. 751;

Washington & O. D. Ry. v. Westinghouse Electric & Manufacturing Co., supra, 89 S. E. 133;

1 *Sutherland on Damages* (4th Ed.), §§45 and 46, pp. 170 *et seq.*

Other authorities prefer to designate this type of damages as *special damages.*

Wells v. Oldsmobile Co., supra, 25 Pac. (2d) 234;

Permutit v. Massasoit Manufacturing Co., supra, 61 Fed. (2d) 530;

Globe Refining Co. v. Landa Cotton Oil Co., supra, 190 U. S. 541-2;

2 *Benjamin on Sales* (6th Am. Ed.) 1141.

A number of authors use both terms to designate this type of damages. Thus the author of the article on sales in *Ruling Case Law* has entitled the pertinent section "Special or Consequential Damages" (24 *R. C. L.* §536, p. 256). The identical title is employed in the *New California Digest* for the section in that work relating to such damages. (21 *New Calif. Digest,* p. 236.) In *Cohn v. Bessemer G. E. Co., supra,* the California District Court of Appeal refers to this type of damages as "special damages" (44 Cal. App. 90) and as "consequential or special damages" (44 Cal. App. 90), and also as "conse-

quential damages" (44 Cal. App. 91). Similarly in the article on sales in *Corpus Juris* the author states:

> "Where a machine delivered proves worthless or defective, the buyer may recover *special and consequential* damages suffered in connection with his at-attempt to operate the machine."
>
> 55 *C. J.* 1189.

The important consideration, however, is not whether the damages appellant seeks to recover should be classified as *special* or *consequential* damages, but that such damages are clearly damages incident to the operation of the machinery, and that their recovery is precluded by the clause in the written contract between the parties, which reads:

> "Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods."

A case squarely in point is *Martin v. Southern Engine & Pump Co., supra.* In that case the seller of cooling equipment, including an engine for the operation thereof, sued for the purchase price. The buyer cross-complained for loss of ice occasioned by reason of the failure of the cooling equipment to function, which, in turn, resulted from the failure of the engine to deliver the warranted power. The contract of sale contained the following provision:

> "It is a further condition of this contract that the Southern Engine & Pump Company shall not be responsible for original damages in the use of this machinery, nor in any event for *consequential damages.*"
>
> 130 S. W. (2d) 1066.

The trial court refused to permit the buyer to introduce evidence as to the alleged loss of ice, on the ground that

such loss constituted *consequential damages,* for which the seller was not liable under the above-quoted provision of the contract. The Texas Court of Appeals affirmed this ruling on the ground that it is "well settled that parties to such a contract of sale may expressly provide for a limitation of the rights of the buyer, in case of a breach of the stipulated warranty." (130 S. W. (2d) 1066.) The Court held further:

> "As a corollary, it seems furthermore plain that the damages the appellant here thus sought to both prove up and recover were *consequential ones*, within the declared legal meaning of that term in the quoted exemption agreement between them."
>
> 130 S. W. (2d) 1066-1067.

Another case practically on all fours with that at bar is *Wallich Ice Machine Co. v. Hanewald, supra.* The contract of sale there under consideration related to refrigerating equipment and provided that the seller should not be responsible for any *consequential damages* resulting from any defect in the equipment. The buyer, when sued for the price, counterclaimed for meat alleged to have been spoiled by reason of the failure of the equipment to function. The Supreme Court of Michigan held that the loss of meat constituted an item of *consequential damages* and that the seller was not liable therefor, saying:

> "* * * conclusively defendant cannot assert this item as a recoupment because of the expressed provisions of the contract under which he purchased the refrigerating apparatus. The contract provision is:
>
> 'The company, however, shall not be responsible for any *consequential damages* or loss of refrigerant resulting from any such defect' (in materials or workmanship)."
>
> 267 N. W. 751.

In *Massey-Harris Harvester Co. Inc. v. Hammer, supra,* a conditional seller of a thresher brought an action to recover its possession because of non-payment of the purchase price. The buyer answered to the effect that delay in delivering the thresher in a condition to be used caused defendant losses in excess of the balance due on the purchase price. The contract contained a clause exempting seller from liability for damages. In overruling the buyer's claim for damages the Supreme Court of Kansas said:

> "But here the contract includes this paragraph, which is equally fatal to the defendants' recovery:
>
> 'It is further understood and expressly agreed that any breach of the warranty or any omission on the part of the vendor does not confer any right of damage for delay or loss of work or earnings, or for other damages. In no event shall the vendor be liable otherwise than for the return of cash and notes actually received by it for the machinery herein described.'
>
> "Provisions of this character have been before the courts more frequently than that passed upon in the Gonder case, *and their validity is well established.* 2 Williston on Sales, Sec. 491, Note 67; Scott v. Vulcan Iron Works Co., 122 P. 186, 31 Okl. 334; Avery Planter Co. v. Peck, 89 N. W. 1123, 86 Minn. 40; Austin Co. v. Tillman Co., 209 P. 131, 104 Or. 541, 30 A. L. R. 293." (244 Pac. 1043.)

See to the same effect:

Barnard & Leas Manufacturing Co. v. Smith, supra;

Washington & O. D. Ry. Co. v. Westinghouse Electric & Manufacturing Co., supra;

Crandall Engineering Co. v. Winslow Marine Railway Co., supra.

III.

Reply to Appellant's Points.

Appellant's principal contentions in support of its appeal from the District Court's order granting appellee's motion for summary judgment are:

> *First:* That under the rule of *ejusdem generis* the clause of the contract limiting appellee's liability must be construed as having application only to *consequential damages.* (Br. pp. 8-12.)
>
> *Second:* That the damages alleged in the amended complaint are not *consequential damages.* (Br. pp. 13-23.)

It is submitted neither contention has merit.

A. The Rule of *Ejusdem Generis* Is Not Applicable to the Clause of the Contract in Question.

Concededly, the rule of *ejusdem generis* requires that words of general description following words of particular description be interpreted as applying to things of a similar character.

> *In re Great Western Petroleum Corporation,* 16 Fed. Supp. 247, 249.

The rule, however, has no application to the clause in question, which reads:

> "Seller shall not be liable for delays, damages or consequential damages, in shipment, erection or in operation of above goods."

The word of alleged general description, viz: *damages,* does not follow, but precedes, the term of alleged particular description, viz: *consequential damages.* Moreover, the rule of *ejusdem generis* has application where several

terms of particular description are followed by a term of general description, but not in situations where there is only one term of particular description.

> *City of Los Angeles v. Superior Court,* 2 Cal. (2d) 138, 140; 39 Pac. (2d) 401.

If the term "consequential damages" has the meaning for which appellant contended below, namely, damages occasioned by an intervening cause and hence not recoverable in any event from appellee [Tr. pp. 85-86], appellant's contention for the application of the rule of *ejusdem generis* has not even colorable force. That rule can have application only where the several terms employed refer to things of the same character, and not where the term of alleged general description refers to something different from the term or terms of alleged particular description. Manifestly, if *consequential damages* refer to losses not recoverable, they are not of the same character as *damages,* which, of course, mean recoverable losses.

A further reason for the non-application of the rule of *ejusdem generis* is that such rule is only an aid to construction, and is never to be applied to a contract unless such application assists in arriving at the intention of the parties.

> "The rule *ejusdem generis,* the rule *exclusio unius,* the rule invoked in this case that *'the particular governs the general,'* and perhaps other rules still, are mere subordinate and auxiliary formulas intended to assist in the application of *the basic rule that the intent of the parties governs.* Neither in law nor in

> ordinary logic can there be an inflexible rule by which parties are arbitrarily held *to forego a general requirement merely because they also state a particular one.*" (*Drainage Commission v. National Contracting Co.,* 136 Fed. 780, 794.)

In stipulating against liability for damages incident to the operation of the machinery appellee specified in the contract "delays or damages," which might have been sufficient, but as a further precaution added "or consequential damages." There is no justification for contending that such precautionary addition had the effect of nullifying the preceding words "delays or damages"; to so hold would be to thwart, not to give effect to, the intention of the parties, which obviously was to exempt defendant from liability for all damages of whatever character incident to the operation of the machinery.

B. The Term "Consequential Damages", as Used Generally in Sales Agreements and in the Instant Contract, Means Exactly the Type of Damages Appellant Seeks to Recover.

Even if the rule of *ejusdem generis* were deemed applicable and were applied to the clause in question, as appellant urges, the clause is nevertheless sufficient to preclude appellee's liability for the damages appellant seeks to recover if such damages are *consequential damages.*

Appellant admits that the damages it claims are special damages. (Br. p. 5.) As above noted, the terms "special damages" and "consequential damages" are used interchangeably in the law of sales to designate exactly the same type of damages. Appellant nevertheless insists that the damages it seeks are not *consequential damages.* (Br. pp. 13-23.)

In the District Court appellant contended that *consequential damages* are "those which are attributable to the interposition of some independent cause other than the acts of the defendant" [Tr. p. 85]; that the term "consequential damages" had such meaning in Wisconsin and that the instant contract must be interpreted in accordance with the Wisconsin law. Appellant cited no Wisconsin decision so defining *consequential damages* (because, as hereinafter appears, the Wisconsin Supreme Court uses that term as synonymous with *special damages*), but relied principally upon three Federal cases, only one of which arose in Wisconsin, and none of which was remotely in point, namely:

United States v. Chicago B. & Q. R. Co., (C. C. A. 8) 82 Fed. 131;

Christman v. United States (C. C. A. 7), 74 Fed. (2d) 112;

United States v. Chicago B. & Q. R. Co., (C. C. A. 7), 90 Fed. (2d) 161.

The only question of damages presented or considered in any of these cases concerned damages recoverable by the owner of property taken or injured by the Government in the exercise of the right of eminent domain. The rights of the litigants were governed by the Federal statutes and Constitution, and the law of Wisconsin was not germane, nor was it referred to or discussed. It is true that in such decisions the term "consequential damages" was used in contradistinction to *direct* or *proximate damages*, and as referring to items of damage attributable, not to the act of the Government, but to an *independent cause,* and hence not recoverable from the Government. Concededly, the term "consequential damages" is some-

times used in that sense. 17 C. J. 711; 1 Sedgwick on Damages (9th ed.) §110, p. 193. That the term was so used in the eminent domain cases relied upon by appellant plainly appears from the following portion of the opinion in *United States v. Chicago B. & Q. R. Co., supra*:

> "Ordinarily, 'consequential damages' are those which do not arise as an *immediate, natural,* and *probable result of the act done,* but arise from the interposition of *an additional cause,* without which the act done would have produced no harmful result; while *'proximate damages'* are those which accrue directly and in natural sequence, and as a specific (hurtful) result from the act done, without the intervention of an *independent cause.*" (82 Fed. (2d) 136.)

As the District Judge pointed out in his memorandum decision, to interpret "consequential damages" as used in the clause of the contract in question to mean damages occasioned by an independent cause and not attributable to appellee, and hence for which it could not be liable, would make the inclusion of the term "consequential damages" in the clause an absurdity, and, furthermore, if appellant's contention for the application of the rule of *ejusdem generis* were also upheld, would make the entire clause meaningless. [Tr. pp. 85-86.] The District Court, therefore, rejected appellant's contention respecting the meaning of the term "consequential damages" in accordance with the well-settled rule that contractual provisions must be interpreted to give them effect and not to make them meaningless. [Tr. p. 86.]

Apparently realizing the futility of contending that the term "consequential damages" as used in the contract

means non-recoverable damages, appellant has abandoned such contention on this appeal and now urges acceptance of the following definition of "consequential damages":

> "Consequential damages are those which are special rather than general, and are caused by the concurrence of some other event attributable to the same origin and cause, that is, attributable to the negligent act of defendant, so continuous in its nature that the concurrent wrongful act which precipitated the damage will not be deemed an independent wrong, but as conjoining with the original act of defendant in creating the disastrous result." (Br. p. 13.)

We think this definition is unintelligible, except to the extent that the first two lines declare consequential damages to be special damages, as distinguished from general damages. Certainly the balance of the definition cannot be intelligently applied in an action such as that at bar to recover damages for breach of warranty. Appellee is not charged with any *"negligent act,"* but with breach of warranty, a contractual obligation. We are not concerned here with any question as to what damages might be recovered from a tort feasor for a negligent act or how his liability might be extended to cover an injury precipitated by "the concurrent wrongful act" of a third party.

Whatever appellant may mean by its definition of *consequential damages,* no authority has been cited which supports it. Without exception, the cases referred to in this portion of appellant's brief as bearing upon the

question of *consequential damages* (Br. pp. 13-23) dealt with claims sounding in tort. Only two of such decisions, namely, *Loiseau v. Arp,* 21 S. D. 566, 114 N. W. 701, and *Christman v. United States, supra,* so much as mention the term "consequential damages", and in both it was held that the damages claimed were not the immediate or natural and probable result of the alleged wrongful act but arose as an "incidental" or "remote" consequence, and hence were not recoverable. (74 Fed. (2d) 114, 114 N. W. 703.)

The remaining cases cited by appellant were actions for *personal injuries* or *wrongful death.* (Br. pp. 18-23.) In none of them was the term "consequential damages" defined or even used. We have no quarrel with the legal principles declared in such decisions respecting the liability of joint tort feasors whose concurrent acts of negligence may contribute to personal injuries or wrongful death; manifestly, such principles have no bearing on any of the issues presented by this appeal.

It is not difficult to understand appellant's failure to cite any authority which supports its definition of *consequential damages;* such definition is obviously the invention of appellant's counsel. The important consideration, however, is that the term "consequential damages" is employed in sales agreements, and in many decisions and treatises dealing with the matter of damages recoverable for breach of warranty, to designate exactly the type of damages which appellant claims by its amended complaint. A number of authorities holding damages of this type to

be *consequential damages* are cited and quoted on pages 25 to 31 of this brief. Such authorities include the authors of *Williston on Sales,* the article on Sales in *California Jurisprudence,* the article on Sales in *Ruling Case Law* and the article on Sales in the *New California Digest,* and the Courts of California, Michigan, Texas, Virginia and Wisconsin. Accordingly, it cannot be seriously contended that the parties to the instant sales agreement used the term "consequential damages" to designate any different type of damages.

Since appellant argues that the instant contract must be "interpreted according to the law and usage of Wisconsin" (Br. p. 18), particular note should be made of *Jones v. Holland Furnace Co., supra.* In that case the Supreme Court of Wisconsin affirmed a judgment obtained by the buyer of a furnace for breach of warranty as to the sufficiency of the furnace to heat the buyer's house. The contract of sale contained no limitation of the seller's liability. One of the items of damages allowed by the trial court was the sum of $400 on account of the plaintiff's loss of roomers who left because the house was improperly heated. In the report of the case such loss is referred to as an item of "consequential damages" and in affirming the judgment the Supreme Court said:

> "We find no error as to the allowance of *consequential damages.* It was undisputed that the roomers left because the rooms were not properly heated, and the consequent loss to the plaintiff was established by the proof." (206 N. W. 59.)

C. The Allegations of the Amended Complaint Do Not Show Any Practical Construction of the Contract by the Parties, and the Clause of the Contract in Question, in Any Event, Is Free From Ambiguity.

Appellant argues (Br. p. 24) that the parties so construed the contract as to render appellee liable for the damages appellant seeks to recover. Neither the amended complaint nor any other pleading contains allegations showing a practical construction of the contract, nor any suggestion that the contract is in any respect ambiguous so as to necessitate or warrant the introduction of collateral evidence to establish its meaning. Appellant's entire argument on this point is based upon the allegation in the amended complaint to the effect that appellee devoted some three hundred thirteen hours without charge to appellant in an attempt to adjust the machinery. [Tr. p. 30.] Parenthetically, it may be noted that this allegation of the amended complaint is denied. [Tr. p. 48.] For the present purposes, however, let it be assumed that after delivery of the machinery appellee did devote a considerable amount of time to adjusting and repairing the same for which it made no charge to the appellant. Such action on the part of appellee is in no sense inconsistent with its disclaimer of liability for the damages appellant seeks by its amended complaint, and hence could not amount to a practical construction of the agreement.

As has been heretofore shown, the damages appellant claims are consequential or special damages incident to the operation of the machinery. There are a number of possible reasons why a seller of machinery might adjust or repair the same without charge to the buyer, irrespective of his liability or non-liability for such special or consequential damages:

(a) The seller might make the repairs or adjustments without charge to the buyer not because legally obligated to do so but in order to preserve the buyer's goodwill.

(b) The seller might make such repairs or adjustments without charge to the buyer in order to escape liability for *general damages* (*i. e.,* the difference between the value of the machinery as delivered and the value it would have had if as warranted).

(c) The seller might make the adjustments or repairs without charge to the buyer in order to satisfy a liability such as that imposed by the instant contract to replace or give credit for defective parts.

Certainly, no seller of machinery motivated by reasons such as any of those above set forth, who adjusted or repaired the machinery without charge to his purchaser, would thereby admit liability for *special* or *consequential damages* which the buyer might sustain or claim.

We do not question the well-settled rule that a practical construction of a written contract by the parties to it is an excellent means of ascertaining what the parties intended. Neither this rule nor any other rule of construction, however, has any application unless the contract is ambiguous. (*Pierce v. Merrill,* 128 Cal. 464, 472; 61 Pac. 64.)

The instant contract is free from ambiguity. It clearly states that appellee shall not be liable for damages or consequential damages incident to the operation of the machinery. There is no occasion for construction or the application of any rule of construction. The plain language should be given effect.

D. No Question as to the Statute of Limitations or Laches Was Presented by the Motion for Summary Judgment, Nor Decided by the District Court, Nor Is Any Such Question Presented by This Appeal.

Appellant's Fourth Point, as set out in its opening brief is entitled:

> "The Plaintiff's Action Is Not Barred by the Statute of Limitations or Laches, It Having Retained the Machinery at Defendant's Request, in Order to Afford the Defendant an Opportunity to Place the Machinery in Such Working Order as to Comply With Defendant's Representations and Plaintiff's Requirements, and Plaintiff Having Deferred the Commencement of Its Action in Reliance Upon Defendant's Representations That It Would Place the Machinery in Such Working Order as to Comply With Defendant's Representations and Plaintiff's Requirements." (Br. p. 27.)

Both this title and the argument which follows are immaterial. No question of laches or the statute of limitations was presented by the motion for summary judgment and hence no such question can be properly considered on this appeal.

E. It Is Immaterial Whether Any Warranty, in Addition to That Expressed in the Written Contract, Could Be Implied; the Sole Question Is as to Appellee's Liability for the Damages Claimed by Appellant in Its Amended Complaint.

The heading to the Fifth Point urged by appellant in its brief reads:

> "Surrounding Circumstances Upon Which an Implied Warranty Is Predicated May Be Shown by Parol Testimony Notwithstanding the Contract Was

Reduced to Writing and Contained a Statement That the Parties Were Not Bound by Any Verbal Understanding, the Contract Not Having Contained a Detailed Statement of the Warranty, or a Detailed Description of the Goods." (Br. p. 29.)

We think this heading is not an accurate statement of law, and that it is in any event inapplicable to the case at bar.

The sales agreements considered in the California cases cited by appellant (Br. pp. 29-33) were entered into prior to 1931 when California enacted the Uniform Sales Act. (Calif. Stats. 1931, Chap. 1070) The majority of the authorities who have had occasion to consider the question under the Uniform Sales Act holds that where a sales agreement has been reduced to writing, contains an express warranty and recitals indicating that the contract expresses the entire agreement of the parties, no warranty will be implied.

S. F. Bowser & Co. v. Birmingham, 276 Mass. 289, 177 N. E. 268, 270;

Sterling-Midland Coal Co. v. Great Lakes Coal & C. Co., 334 Ill. 281, 165 N. E. 793, 796-797;

McCabe v. Standard Motor Construction Co., 106 N. J. Law. 227, 147 Atl. 466, 467;

Lasher Co. v. La Berge, 125 Me. 475, 135 Atl. 31, 32;

Graves Ice Cream Co. v. Rudolph W. Wurlitzer Co., supra, 100 S. W. (2d) 822.

If, as appellant insists (Br. p. 18), the instant contract is to be interpreted according to the laws of Wisconsin, why does appellant rely exclusively upon California deci-

sions? The answer, of course, is that the Wisconsin decisions do not support appellant's contentions. As has already been noted, the Supreme Court of Wisconsin in *Jones v. Keefe, supra,* after ruling that evidence of any oral representations would not even be admissible, said with respect to a contract such as that at bar, which contained a recital that no verbal understandings were binding unless incorporated therein:

> "The clause of the contract that no verbal agreements were entered into not expressed in writing is *expressive of the intent and purpose* of the parties *that all the terms and conditions of the sale are embraced in it.*"
>
> 150 N. W. 955.

It is entirely immaterial, however, whether appellant can rely upon an implied warranty, in addition to the express guarantee contained in the contract, or upon both such express guarantee and such implied warranty. The amended complaint charges that the machinery did not work as warranted and details the items of damage alleged to have resulted from such breach of warranty. The existence of a warranty is admitted. The sole question presented by the motion for summary judgment and by this appeal is whether appellee is liable for the damages claimed in view of the provisions of the written contract specifying the remedy available to appellant for breach of warranty and stipulating that appellee shall not be liable for damages or consequential damages incident to the operation of the machinery. The answer to this question is in no wise dependent upon whether the warranty was express or implied, or both.

F. There Is No Inconsistency Between the Guarantee, as Expressed in the Contract, and the Clause Therein Contained Exonerating Appellee From Liability for Damages Incident to the Operation of the Machinery.

The final point urged by appellant in its brief is that the clause of the contract exempting appellee from liability for damages and consequential damages incident to the operation of the machinery is inconsistent with the guarantee set forth therein. (Br. p. 34.)

There is no such inconsistency. Appellant's remedy in the event of breach of warranty is clearly specified in the contract, namely: the right to return and receive credit for defective parts.

A similar contention of inconsistency was made in *Martin v. Southern Engine & Pump Co., supra.* In disposing of such contention, the Texas Court of Civil Appeals there said:

> "* * * in other words, there was no necessary nor apparent repugnancy or inconsistency between the two provisions, they being construable together as simply meaning that, while the first warranted the engine to pull the Frick Compressor 'at 200 head-pressure, Speed 360 RPM, Engine Speed 1200', the second at the same time negatived any liability of the appellee for *consequential damages* suffered by the appellant for any breach of such warranty;"
>
> 130 S. W. (2d) 1066.

Conclusion.

The short answer to appellant's appeal is that it was not timely taken and hence this Court does not have jurisdiction. The complete answer on the merits of the controversy is that the provisions of the written agreement between the parties preclude recovery of the damages claimed by appellant. As the District Judge said in his memorandum decision [Tr. p. 85], appellant by the terms of the contract "waived the damages it now seeks to recover."

Appellee's motion for summary judgment was properly granted by the District Court, and the ruling should be affirmed.

Respectfully submitted,

LAWLER, FELIX & HALL,
OSCAR LAWLER,
MAX FELIX,
WILLIAM T. COFFIN,

Attorneys for Defendant and Appellee, George J. Meyer Manufacturing Company.